JD-43-06
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MOORE COLLEGE OF ART AND DESIGN

and Case No. 4-CA-34292

MOORE FEDERATION OF TEACHERS, AFT
LOCAL 2208, AFL-CIO

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for the General Counsel.
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DECISION

Statement of the Case

Robert A. Giannasi, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 10, 2006. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a "Code of Ethics and Business Conduct" that subjected employees to possible discipline. According to the complaint, Respondent implemented the Code, a mandatory subject of bargaining, without affording the employees' bargaining agent, the Charging Party Union, Moore Federation of Teachers (herein the Union or MFT), the opportunity to bargain about the Code and its effects on unit employees. The Respondent filed an answer denying the essential allegations in the complaint. After the trial, the parties filed briefs, including reply briefs from the General Counsel and Respondent, which I have read and considered.

Based on the entire record, including the stipulations of the parties, the exhibits, the testimony of the witnesses and my observation of their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a non-profit Pennsylvania corporation, is engaged in the operation of a college at its campus at 20th and Benjamin Franklin Parkway in Philadelphia, Pennsylvania. As Respondent admits, it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

1. Background

Respondent operates a 4-year college of arts, which awards bachelor of fine arts degrees in the professional arts and the fine arts. It has about 450 students, all of them female. Tr. 22, 113. It employs about 100 faculty members, including tenured faculty and five-year and three-year contract faculty, all of whom are paid a yearly salary. Tr. 22-23, 113. Respondent also employs adjunct faculty members who are paid by the course. Tr. 23. The adjunct faculty constitutes about two-thirds of the faculty. Tr. 24, 113-114. All of the faculty members are represented by the Union, which has had a bargaining relationship with Respondent for at least 30 years. Tr. 25, 88-89. The most recent collective bargaining agreement between the parties is effective from September 1, 2004 through August 31, 2007. Jt. Exh. 1.

Since January 1997, Respondent has also had in effect certain rules and guidelines memorialized in a "Faculty Handbook." R. Exh. 1. An introduction to the handbook provides that nothing therein is "inconsistent with or intended to supersede" the "MFT contract." It also provides that the MFT contract is "the authoritative document in reference to the details of working conditions and employment benefits." Part II of the handbook covers faculty personnel policies and sets forth such matters as progressive disciplinary procedures and a definition of "professional ethics." It also includes provisions on conflicts of interest, academic freedom and sexual harassment. Parts of the handbook, particularly Part II, specifically reflect provisions in the bargaining agreement of the parties. Indeed, the caption to Part II of the handbook states that "all text in italics is drawn directly from the MFT contract, with the location cited." For example, the handbook's section on progressive discipline follows substantially Article III of the contract. The contract provides, as does the handbook, for discharge only for just cause, but it also specifically provides that a faculty member may be discharged for a violation of "professional ethics." Addendum C to the contract sets forth a definition of professional ethics, which is, in part, incorporated in the handbook. Article XI covers academic freedom, which is also incorporated in the handbook, although the latter contains an additional sentence. Article V(2)(h) provides that full-time faculty cannot teach a regularly scheduled course at another college without prior approval; that provision is part of the conflict of interest provision in the handbook. Article IX of the contract sets forth a grievance procedure leading to arbitration, which, at least for some faculty members, appears to be broader than the grievance procedure set forth in the handbook.

2. Respondent Adopts a Code of Ethics and Business Conduct and Applies the Code to its Union-Represented Faculty

On August 17, 2005, Respondent's vice-president for Finance and Administration, William Hill, sent an e-mail to all faculty members, in which he announced that the College's Board of Trustees had approved a Code of Ethics and Business Conduct (Jt. Exh. 2), which would apply to them. GC Exh. 2. Hill attached the Code to the e-mail for the members' "review and signature." A Receipt Acknowledgement attached to the Code required the employee to affix his or her signature to a statement agreeing to be bound by the terms of the Code, with the understanding that "this form" would become a "permanent part of my employee record." Jt. Exh. 3. Hill asked the employees to read the Code and return the acknowledgement by September 15, 2005. Hill explained that the Code, which also applied to employees other than faculty members, was part of the Respondent's initiative to "fully comply with both the letter and spirit of the Sarbanes-Oxley Act of 2002." Hill stated that the Act "required both profit and not-

for-profit corporations, like the College, to make changes to it's (sic) governance structures and ethics and auditing policies." Hill also noted that Respondent had contracted with a "third party vendor" to provide a toll free number, which would give faculty and staff "an anonymous way to report any illegal or unethical activity." This was the first time the Union became aware that Respondent had adopted the Code and intended to apply it to the employees represented by the Union. Tr. 78.[1]

The Code of Ethics and Business Conduct is a comprehensive 20-page document, drafted by Vice-President Hill from templates provided by advisory services specializing in compliance with the Sarbanes-Oxley Act and recommendations of the National Association of College and University Business Officers (NACUBO), of which Respondent is a member. Tr. 146, 161, 127-128, 132. The NACUBO Advisory Report 2003-3, which is in evidence as R. Exh. 8, discusses the Sarbanes-Oxley Act's requirements and specifically recommends a code of ethics to address two specific requirements in the Act. The first (Section 303) is that it is unlawful for a financial officer to fraudulently mislead an auditor with respect to financial statements. The second (Section 406) is that each company must disclose whether it has adopted a code of ethics for its senior financial officers. While the Advisory Report concedes that the Act "does not apply to institutions of higher learning or other public or not-for-profit entities," it suggests that those institutions could utilize some aspects of the Act such as independent auditors and audit committees. The Report also suggests that the "best practice" is the adoption of a code of ethics for senior financial officers. The Advisory Report includes a NACUBO-devised code of ethics, which specifically applies only to business officers of colleges and universities. Minutes of the meetings of the Respondent's Board of Trustees show that Hill, with the help of Trustee Art Block, also used the existing Faculty and Staff handbooks to conform code templates to the Respondent's operation. Tr. 147-148, 161, R. Exh. 5. The minutes do not explain why Respondent decided to apply the Code to other personnel aside from business or financial officers, much less to the faculty members involved in this case. But Hill testified that his reason for including faculty members, particularly the 10 department "chairs," was that they sometimes get involved in "significant purchasing decisions." Tr. 149. He also cited "reasons of equity" and an interest in having everyone report ethical violations. Tr. 167-168. [2]

In any event, the Code does apply to all faculty members, as well as other staff and officers of Respondent. Compliance with the Code is a condition of continued employment and violation of the Code constitutes grounds for disciplinary action, including termination. It is also a condition of employment that the covered employee sign, annually, an acknowledgement that

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[1] Respondent's president, Happy Fernandez, testified that Respondent's Board of Trustees considered adopting the Code because of a letter from the Respondent's external auditor dated August 31, 2004, which discussed the requirements of the Sarbanes-Oxley Act. Tr. 120-121. Although the auditing firm conceded that Respondent was not legally covered by the Act, it stated the Act had forced the nonprofit sector to "analyze its board practices and methods of operation." The auditing firm also suggested that Respondent review, among other things, "Insider transactions and Conflict of Interest policy" to determine if the College "is complying with 'best practices' of nonprofit organizations." RX 2. Much of Fernandez's other testimony about the so-called "motivation" for implementing the Code (see, for example, Tr. 118-119) is largely irrelevant since motivation is not an issue in this case. It was, in addition, too general to be of much use in making factual findings in this case.

[2] The record contains no evidence to support Hill's conclusory testimony about faculty purchases so there is no way to make findings as to whether such purchases were required, who made or authorized them, or what kind of purchases were involved.

he or she has received a copy of, and is in compliance with, the Code. Violation of the Code includes deliberately withholding relevant information concerning a potential violation. Moreover, failure to appropriately disclose circumstances that may constitute a violation of the Code is itself a violation of the Code.

Although many of the provisions of the Code deal with financial and technical matters, with which faculty members would rarely, if ever, be involved, many do not and they broadly prohibit conduct that is somewhat general and ambiguously defined. For example, Section VIII, entitled Duty of Loyalty, prohibits employees from taking business opportunities that are within Respondent's activities or planned activities and from competing with Respondent, which is broadly defined as activity that takes away from Respondent's opportunities for "sales or purchases of products, services or interests." Section IX, entitled Conflicts of Interest Policy, broadly prohibits conflicts of interest, which, according to the Code, may exist when faculty are involved in activities for personal gain, "whether measured in tangible or intangible benefits, that might interfere or appear to interfere with the objective performance of their duties and responsibilities." According to the Code, the above would include activities that "could reflect negatively on the reputation of the College." Section IX lists 11 examples of activities that may be prohibited and therefore require disclosure. Among the examples are "offering or accepting business courtesies" from a competitor; and participating in "outside activities" which could reasonably expected to interfere with the faculty member's "service obligation to the College." Subsection B, however, permits a faculty member to become an employee of another organization, provided the other employment does not interfere with the member's ability to perform duties for the College. Section X, entitled Offer or Acceptance of Business Courtesies, defines in great detail specific prohibited conduct under this section, including the acceptance of gifts, particularly those valued over $250 in the same calendar year. Another provision, Section XIII, requires compliance with all applicable laws and regulations, including, in Subsection E, those dealing with equal opportunity, discrimination and harassment. [3]

On August 22, 2005, Hill spoke to a group of bargaining unit members about the Code at a meeting on campus. He was almost immediately interrupted by a number of "agitated" employees who protested that the Respondent had not contacted or negotiated with the Union about the Code before it was applied to them. Tr. 27-28, 78-79, 90-91, 150-151. Hill responded by telling the then Union president, Dan Sipe, to consult with the Union's attorney or "whoever you have to run it past," and ended the meeting. Tr. 28-29. Apparently as a result of this meeting, the September 15 deadline for acknowledging receipt of and compliance with the Code was extended. Jt. Exh. 4, 6.

In late October, Steve Sherman was elected Union president to succeed Sipe. On October 27, 2005, Sherman sent an e-mail to Respondent's president, Happy Fernandez, introducing himself and asking for a meeting on the Code of Ethics issue. On November 9,

[3] Hill testified as to his understanding of some of the provisions of the Code. Since he used templates for much of his drafting, I find his testimony as to the meaning of those provisions to be unreliable. Similarly unreliable is Union President Sherman's testimony about his understanding of the Code provisions. What is significant is the objective evidence of the language of the Code provisions themselves. I do find significant, however, the testimony of Sherman and other faculty members as to the perceived ambiguity of the Code provisions as applied to their own employment situations. As explained more fully below, the ambiguity of those provisions is manifest as an objective matter. Accordingly, I find perfectly plausible the testimony of Sherman and other faculty members that they did not understand some provisions of the Code and how they impacted the faculty members' own employment conditions.

President Fernandez sent a letter to President Sherman setting forth the Respondent's position on the Code. She agreed to meet with the Union, but insisted that that meeting would not be "a negotiation session." In support of her position, she cited two provisions of the collective bargaining agreement, the management rights clause in Article XV and Section III of Addendum C, entitled, "Professional Ethics." She asked that the Union submit its objections to the Code in writing and further extended the deadline for faculty to sign the Code's acknowledgement form. GC Exh. 5.

The parties met, as agreed, in President Fernandez's office on November 11, 2005. At the meeting, Union President Sherman stated the Union's position that the Code was a change in work rules and Respondent was required to negotiate these changes. Respondent's vice-president, Hill, who was also present, insisted that Respondent did not have to negotiate on the issue because of the management rights clause in the collective bargaining agreement. Tr. 35. During the meeting, Sherman gave Hill a six-page document summarizing faculty objections to implementation of the Code, including the point, since conceded by Respondent, that the Sarbanes-Oxley Act did not apply to non-profit corporations such as Respondent. GC Exh. 6. Sherman also made several specific oral objections of his own to the Code. He objected to the requirement that the acknowledgement form had to be signed annually as a condition of employment, which was itself a new work rule. Tr. 38. He also mentioned that the Code appeared to ban faculty members from receiving honoraria from another college, without permission, which, he pointed out, was a new condition of employment. Tr. 39. He also said that the Code's prohibition against working for a competitor was broader than the existing contract provision covering such conduct. Tr. 41-42. Sherman also objected to one of the conflict of interest provisions, which broadly prohibited faculty members from doing or saying anything that might reflect negatively on the college. He noted that most faculty members were artists and if they created a controversial work of art they might run afoul of the Code and be punished or disciplined. According to Sherman, no such prohibition had existed before. Tr. 41. President Fernandez's response to Sherman's statements was that, notwithstanding the application of the Code, the faculty retained the protections of the collective bargaining agreement, presumably the good cause standard for discipline and discharge and the grievance-arbitration provisions. Sherman responded that some of the faculty did not have the benefit of the full grievance-arbitration provisions. For example, only tenured faculty and teachers with 5 year contracts have the right to take a matter to arbitration. Tr. 42. At that point the meeting ended. Tr. 43.[4]

After the above meeting, Sherman and Fernandez exchanged e-mails. Sherman asked that the Respondent bargain about the Code and Fernandez restated Respondent's position that it did not believe it was obligated to bargain about the Code and would not do so. Jt. Exh. 11.

On November 17, 2005, Hill sent a letter to faculty members explaining the Respondent's position in some detail. GC Exh. 7. He conceded that some provisions of the Sarbanes-Oxley Act did not apply to Respondent, but he asserted that some did, namely, the document retention and whistleblower protection provisions. He nevertheless stated that Respondent voluntarily decided to adopt the Code of Ethics and Business Conduct policy as part of an undefined "best practices." The phrase harkens back to the NACUBO

[4] Neither this meeting nor any other meeting between the Union or its members and the Respondent or its representatives constituted collective bargaining or negotiations. President Fernandez testified that Respondent did not engage in collective bargaining negotiations with the Union. Tr. 136.

recommendations discussed above. Hill also answered two faculty objections to the Code, which he himself framed. To the objection that much of the Code covers financial transactions, which does not directly affect faculty, he stated that some faculty members do make significant purchases, such as art supplies. He also answered the objection that violation of the Code might result in termination or discipline by adding a provision in the acknowledgement form that "signing this Code" would not waive or affect rights in the present collective bargaining agreement. Hill then extended the deadline for signing the revised acknowledgement form from the previously extended deadline of November 15 to November 30, 2005. A somewhat shorter letter from Respondent's president, Happy Fernandez, to Union President Sherman, dated November 15, 2005, confirmed both the new language in the acknowledgement form and the extension of the deadline. Jt. Exh. 8.

Many employees signed the revised acknowledgement form under protest. For example, Union President Sherman signed with the following handwritten notation: "Questions about the document have not been answered with clarity, and I cannot honestly say that I understand its contents." GC Exh. 8. It is clear that, as of November 30, 2005, the Code was in effect and applied to the Union-represented faculty members. Tr. 47, 102-103, 166-167, GC Exh. 10, 12. The Code's hotline, a toll-free 800 telephone number for employees to anonymously report violations of the Code, however, was operational as of September 30, 2005. Tr. 168. As of the date of the hearing, no employee had been disciplined for not signing the revised acknowledgement form or for having signed it under protest. Tr. 61, 95-96. Nor has the General Counsel submitted any evidence that any faculty member has been disciplined or otherwise cited for violating any provision of the Code itself. According to Vice-President Hill, Respondent has not yet had "an opportunity" to apply the Code to any bargaining unit member. Tr. 167.

B. Discussion and Analysis

An employer violates Section 8(a)(5) and (1) of the Act if, without bargaining to impasse with the bargaining agent of its employees, it unilaterally changes their terms and conditions of employment. See *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 198 (1991); *NLRB v. Katz,* 369 U.S. 736, 742-743 (1962). Employers and unions are required to bargain over so-called mandatory subjects of bargaining, which are those that are "plainly germane to the working environment" and are "not among those managerial decisions . . . at the core of entrepreneurial control." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). Included among those mandatory subjects are changes in, or implementation of, work rules or employer policies that carry a disciplinary penalty. See *Southern Mail, Inc,* 345 NLRB No. 43, slip op. 3 (2005); *King Soopers, Inc.*, 340 NLRB 628 (2003); and *Edgar P. Benjamin Healthcare Center,* 322 NLRB 750, 751 (1996). Accord: *Scepter v. NLRB*, 280 F.3d 1053, 1056-1057 (D.C. Cir. 2002) (Board correctly concluded that change in policy was substantial because it added a penalty provision to a "previously informal general policy" and required a signed declaration as a "condition of continued employment.").

There is no dispute that the Code was implemented unilaterally and without bargaining between Respondent and the Union (R. R. Br. 1 n. 1; Tr. 16, 136). Indeed, Respondent's representatives repeatedly told Union representatives that they would not negotiate over the Code because, in their view, its implementation was not a bargainable issue. The question then becomes whether the Code operated as a change in employer policies, rules or working conditions. Respondent argues that it did not, and, in the alternative, that any changes were

insignificant or "de minimis." R. Br. 16, 17.[5] It also asserts that the Code simply "recites and clarifies that which was already prohibited," presumably in the Faculty Handbook (R. Br. 17 and R. R. Br. 1-2). The record evidence, however, shows to the contrary. The Code not only changes existing policies and working conditions, as reflected both in the Faculty Handbook and in the contract, but also in past practice without regard to the contract and the handbook. Moreover, those changes were significant.

The Code explicitly provides that compliance with the Code is a condition of continued employment and that any violation of the Code constitutes grounds for disciplinary action. It also provides that employees are required to report violations of the Code. The Faculty Handbook, which the Respondent contends was updated by the Code, had no such provisions that applied generally to all of the handbook policies. The only reference to discipline in the handbook was in the provisions on sexual harassment. Contrary to Respondent's contention (R. Br. 21), nothing in the sexual harassment, academic dishonesty and health and safety provisions of the handbook requires faculty members to report violations of those provisions (R Exh. 1, pp. 26-28, 32). Even if they did, the Code's reporting requirements are broader than those in the handbook and cover every violation of every section of the Code. Thus, the new provisions cited above not only amount to changes, but significant changes that pervade every part of the Code.

Moreover, to the extent that the Code attempts to regulate some matters in the Faculty Handbook that were also part of the collective bargaining agreement, that attempted regulation is not only different, but the differences directly affect the existing contract. For example, the Code's language on conflicts of interest is different from the language used on that subject in the bargaining agreement. And nothing in the contract made compliance on those subjects a condition of continued employment, required reporting violations or provided for discharge for violations. Although the contract provides that a faculty member could be discharged for a violation of professional ethics, a detailed definition of professional ethics was part of the contract. The Code has no specific provision entitled "professional ethics," but parts of the Code that define a "duty of loyalty" and "conflicts of interest policy" arguably cover the same topics and differ from the handbook and contract definitions. Significantly, the Code's conflicts of interests section is much broader, covering 11 specific incidents that are described as potential conflicts of interest (Jt. Exh. 2 p. 8-11). Only one of those, the restriction on working for a competing institution, is mentioned in the Faculty Handbook or in the contract. And, even there, the handbook and the contract simply restrict such work; they do not ban it, as provided in the Code (Jt. Exh. 2, p. 9, Jt. Exh. 1, p. 9 and R. Exh. 1, pp. 22, 26). Indeed, Vice-President Hill conceded that the Faculty Handbook's "conflicts of interest" policy, which was at least partially reflected in the contract, was a "lot less explicit" than the Code's conflict of interest policy. Tr. 171. To the extent that the Code provides that all violations of the Code are grounds for discipline, this is a significant change from the contract, which only mentions discharge for the violation of specifically defined "professional ethics."

The record reveals that many of the changes were conceded by Vice-President Hill. For example, the Code requires employees to sign a written acknowledgement that they received a copy of the Code and agreed to abide by its terms. According to Hill, this was not something that was in effect prior to implementation of the Code. Tr. 169. The Code also requires that employees report violations of the Code, subject to being in violation of the Code themselves if they failed to report such a violation. According to Hill, there was no written policy to this effect

[5] In its reply brief, however (R.R. Br. 1), Respondent does not dispute that "certain sections of the Code represent new guidelines or procedures regarding business conduct."

in the past. Tr. 169-170. Moreover, according to the uncontradicted testimony of Union President Sherman, the reporting requirement is broader; in the past, employees were required to report only problems with students or sexual harassment. Tr. 51. Nor, according to Hill, was there any policy in effect prior to the Code that provided for a call-in procedure to report violations of Respondent's Faculty Handbook provisions or any policy defining the "duty of loyalty." Tr. 168, 170. More specifically, the duty of loyalty in the Code prohibits faculty members from taking advantage of business opportunities within the scope of Respondent's activities or planned activities, using their positions with Respondent for personal gain or competing with Respondent. Competing with Respondent is defined broadly and might well include teaching at another school, as Vice-President Hill conceded (Tr. 172). All of this is a change from prior policy, whether or not reflected in the handbook or the contract, as shown by the testimony of Union President Sherman and Vice-President Hill. Their testimony also shows that nothing like the Code's conflicts of interest policy, which broadly limits faculty employment and other activities, such as using an existing position or the College's name for personal gain and dealing with competitors or suppliers, existed in either the Faculty Handbook or in the contract. Tr. 52, 58, 170-171. The new policy requires disclosure by all employees of any employment with a competitor institution. But, prior to enactment of the Code, the only limitation on other employment was a requirement that full-time faculty obtain permission before teaching a course during the academic year, a limitation embodied in the contract. Full-time faculty members could teach anywhere during the summer months without securing permission and adjunct professors were not prohibited from teaching at other institutions. Tr. 51-55, 170, 172-173. Another provision of the Code, which prohibits conduct that "could reflect negatively on the College," could arguably restrict employees' creative work since many of them are artists. That provision is new. Tr. 52-53, 170-171. Indeed, this Code provision appears to conflict with contract provisions that protects faculty members' freedom in research and publication and prohibit institutional censorship or discipline. See Jt. Exh. 1 at p. 21. Finally, the Code prohibits acceptance of "business courtesies" valued in excess of $250 without approval. That prohibition had not previously been in effect for faculty members. Tr. 57-58, 173.

The above unilateral changes are far more significant than those found violative of the Act by the Board and the courts in other reported cases. See *Edgar P. Benjamin, supra,* 322 NLRB at 752 (change in work rule requiring the inspection of packages); *W-I Forest Products,* 304 NLRB 957, 959 (1991) (change in smoking policy); *Ford Motor Co. v. NLRB, supra*, 441 U.S. at 498 (changes in prices in an in-plant cafeteria and vending machines); *Scepter, Inc. v. NLRB, supra*, 280 F.3d at 1056-1057 (change from informal to formal policy banning the insertion of steel banding into furnaces and requiring the policy statement to be signed amounted to new conditions of employment).

In its brief (R. Br. 25), Respondent cites some testimony from Vice-President Hill in support of its argument that the Code did not change existing policies or that the changes were insignificant. That testimony is contrary to other evidence discussed above, including other testimony by Hill himself. Much of Hill's testimony about no changes or insignificant changes came as a result of his direct examination, but it was unfocused until he was cross examined, at which time he conceded that some items in the Code were changes from past policy. For example, Respondent asserts that Hill's testimony "clarified" that faculty may teach courses elsewhere, and that Union President Sherman conceded that nothing in the conflicts of interest section of the Code prohibited such outside employment. But it is the duty of loyalty section of the Code that arguably prohibits such outside employment because it broadly prohibits taking business opportunities from the College, using a faculty member's position or information from the College for personal gain, or competing with the College. In any event, Hill's testimony in this proceeding cannot operate as a clarification of a written rule that remains in effect. Nor does Hill's testimony that signing an acknowledgement page is "standard practice" (R. Br. 31)

counter the objective evidence which shows that requiring such acknowledgment as a condition of employment in the Code was a material change in policy. See *Scepter, supra,* 280 F.3d at 1057. Respondent also cites President Fernandez's testimony that other employees could be or were disciplined for conduct that is now prohibited by the Code (R. Br. 36, R. R. Br. 2). That testimony, first offered in the form of Fernandez's opinion (Tr. 138), was unsupported by any examples of actual discipline. Moreover, Fernandez's testimony in this respect was shown, on cross-examination (Tr. 141-143), to be hesitant, speculative and vague. Indeed, for those reasons, I found her testimony on that issue and most of her testimony on the relevant issues in this case to be unreliable.

Respondent argues (R. Br. 16, 19) that the explicit threat of discipline for violations of the Code is not a significant change because employees are protected by the same "just cause" standard of discipline under the contract that obtained before implementation of the Code. But, as the General Counsel points out (GC Br. 18-19), that is not good enough. Permitting an employee or the Union, on his or her behalf, to argue in a contract grievance that a disciplinary action already imposed was not for "just cause" is qualitatively different from bargaining over the rule that permits such discipline in the first place. The employee filing the grievance would already have been disciplined, perhaps even fired, before being able to file a grievance and would not be permitted to contest the validity of the discipline based on the unreasonableness of the rule or policy allegedly violated. See *Hi-Tech Corp.,* 309 NLRB 3, 4, enf'd 25 F.3d 1044 (5th Cir. 1994), where the Board rejected a similar argument by stating that "there is no substitute for full bargaining *prior to* the implementation of the rule (emphasis added)."[6]

In the alternative, the Respondent alleges that the Union waived any right to bargain about the Code because of the contractual management rights clause, which reserves certain matters, including those not covered in the contract, to management.[7] It is well settled that the waiver of bargaining rights under such a contract clause must be "clear and unmistakable." See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Johnson-Bateman Co*., 295 NLRB 180, 184 (1989); *Bath Iron Works Corp.,* 302 NLRB 898, 902 (1991). The party asserting the existence of the waiver bears the burden of proof on this issue. *Wayne Memorial Hospital Ass'n.*, 322 NLRB 100, 104 (1996). Moreover, the Board has consistently found that a general management rights clause does not amount to a waiver of a union's right to bargain about "an employer's implementation of a work rule not specifically mentioned in the clause." *Hi-Tech Corp., supra*, 309 NLRB at 4. The contractual management rights clause in this case does not specifically mention work rules, codes of ethics, duty of loyalty, conflicts of interest, or other matters covered under the Code implemented by Respondent. Indeed, as indicated above, some of the subjects arguably covered by the Code, such as professional ethics and the right of full-time faculty to teach at other schools, are specifically covered under the collective bargaining agreement. The professional ethics addendum to the contract describes the prohibitions in some detail, including the use of drugs or alcohol and engaging in conduct or

[6] In addition, some faculty members do not have a contractual right to bring a grievance to arbitration. Their right to invoke the "just cause" standard after a disciplinary action is thus quite limited.

[7] The clause (Article XV) reads as follows: "All matters concerning MOORE, including but not limited to, hiring, promotion, determining rank, firing and suspending or otherwise disciplining faculty members, determining curriculum, determining admissions of students, laying off of faculty members, scheduling work, determining department chair's responsibilities, conferring tenure, and reorganizing the College, are the ultimate responsibility and authority of the Board, except as expressly limited by the terms of this Agreement, and are hereby reserved to management."

relationships where "favoritism, harassment or any improper conduct might be perceived." In these circumstances, I reject Respondent's contention that the Union waived its right to bargain over the implementation of the Code by agreeing to a general management rights clause.[8]

Respondent also suggests (R. Br. 36), that the Union waived any right to bargain about the Code because of the Union's alleged failure to bargain over the Faculty Handbook in the past. According to the Respondent, the Code is simply a clarification of the Faculty Handbook and employees were disciplined for violations of the handbook. And, the argument goes, since the Union never bargained about the handbook, it, in effect, waived any right to bargain about the Code. Respondent is wrong both on the facts and the law. First of all, the Union and the Respondent did bargain over some items contained in the Faculty Handbook. The handbook reflects matters that had previously been bargained about and were included in the handbook in an italicized form, with a reference to the applicable contract provisions. Indeed, the handbook makes clear that the contract is the "authoritative document" with respect to the working conditions of faculty members. To the extent that some items in the handbook were not included in the contract, those items did not carry the disciplinary threats that the Code does; and the Code, as I have indicated, either changed the provisions in the handbook or reflected new policies that changed past practice. As the General Counsel points out (GC Br. 22-23), the Respondent has not established that it had a practice of unilaterally setting rules of conduct, and, even if it did, Respondent has not shown that the Union waived its right to bargain about any changes in those rules. Respondent called employee Deborah Warner to testify about whether or not the Respondent and the Union bargained about the Faculty Handbook. Her testimony is not altogether clear, but she did not support Respondent's position that the handbook was not the subject of negotiations (Tr. 180-181). Indeed, President Fernandez testified that, to her knowledge, the handbook was changed only if and when the parties negotiated a change in the contract. Tr. 140-141.[9]

In any event, it is well settled that a union's past practice of permitting some unilateral changes does not amount to a waiver of its right to bargain over such changes in the future. See *E.R. Steubner, Inc.,* 313 NLRB 459 (1993). Nor has the Respondent submitted any evidence that the issues covered in the Code were specifically explored in contract negotiations and consciously yielded by the Union. See *Johnson-Bateman*, *supra,* 295 NLRB at 184; and *Owens-Brockway Plastics Products,* 311 NLRB 519, 525 n. 17 (1993).

Respondent also argues (R. Br. 31-33, 34-35) that implementation of the Code is not bargainable under the Board's decision in *Peerless Publications, Inc.,* 283 NLRB 334 (1987). In that case, the Board dealt with the bargainability of a code of ethics, together with its penalty provisions, unilaterally imposed by a newspaper on its employees. The Board stated that rules or codes of conduct with penalty provisions fall well within the broad statutory definition of terms and conditions of employment and thus constitute mandatory subjects of bargaining. The Board

[8] Because the management rights clause in this case does not specifically cover the subject matters set forth in the Code, the same result on lack of waiver would obtain if the standard used was the "contract coverage" analysis suggested by the District of Columbia Circuit Court of Appeals. See *BHP (USA) Inc.,* 341 NLRB 1316 n. 2 (2004).

[9] In its reply brief, Respondent cites other testimony by Fernandez for the proposition that the parties did not negotiate over the handbook (R. R. Br. 8). That testimony, which came before that cited above in the cross-examination of Fernandez, does not support Respondent's position. In the cited passage Respondent's counsel posed the question, since your tenure, from 1999 to the present, "do you know" whether there have been negotiations over policies in the handbook. Fernandez answered, "Not to my knowledge." Tr. 139.

also recognized, however, that, in the newspaper business, "editorial integrity lies at the core of publishing control" and some rules of ethics may be immune from bargaining if they are "narrowly tailored to the protection of the core purposes of the enterprise." In balancing these interests, the Board found that such rules were presumptively mandatory subjects of bargaining, but that the presumption could be overcome in some circumstances. In order to overcome that presumption, the employer must show that the subject matter sought to be addressed by the rule goes to the "protection of the core purposes of the enterprise." That means that the rule must, on its face, be "(1) narrowly tailored, in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives." 283 NLRB at 335-337.

In applying those principles to the facts in the case before it, the Board found that it was unnecessary to reach the issue whether the ethics code provisions were sufficiently restricted to the subject matter necessary to the newspaper's editorial integrity so as to overcome the initial presumption of mandatory bargainability. Rather it found the code was not appropriately limited to those employees whose adherence to the code might be necessary. It also found that the code provisions were overly broad rather than narrowly tailored to meet with particularity the legitimate objectives of the employer. The Board also found the code provisions contained vagueness and ambiguities that were unacceptable in circumstances where violations could subject employees to discharge. Accordingly, the Board found a violation and ordered that the rules be rescinded and that the employer bargain about the rules in the future. *Id.* at 336-337.

Clearly, in this case, as in *Peerless,* the Respondent's Code invokes a penalty component as to terms and conditions of employment, which creates the presumption that its implementation is a mandatory subject of bargaining. Although the Respondent contends that the Code in this case satisfies the requirements in *Peerless* to overcome the presumption of bargainability, it has cited no Board case in which the Board has found that the presumption has been overcome. Indeed, in *Peerless* and its progeny, the Board has repeatedly rejected attempts to avoid bargaining because of an allegation that the rules unilaterally imposed were narrowly framed to protect an employer's core purposes. See *American Electric Power Co.,* 302 NLRB 1021, 1022 (1991), enf'd 976 F.2d 725 (4th Cir. 1992); *GHR Energy Corp*., 294 NLRB 1011, 1012 (1989), enf'd mem. 924 F.2d 1055 (5th Cir. 1991); *W-I Forest Products, supra,* 304 NLRB at 958-959; *Edgar P. Benjamin, supra,* 322 NLRB at 751-752; and *King Soopers, supra*, 340 NLRB at 629.[10]

This case likewise does not present circumstances that would overcome the presumption of bargainability. First of all, according to the Respondent, the Code is merely an update or clarification of the existing Faculty Handbook. I reject that contention, as shown above, because the Code was a significant change from existing rules and policy. But to the extent that some of the handbook provisions reflect matters that previously had been bargained about and were contained in the collective bargaining agreement, it is clear that the subject matters of those provisions were matters that the Respondent had bargained about. Respondent had never before contended that those matters were outside the scope of bargaining because they dealt with strictly entrepreneurial issues or the core purposes of the enterprise. Having bargained about these matters before, it rings hollow for Respondent to say that it cannot bargain about them now.

[10] In view of my disposition of this case, I have no reason to address Respondent's assertion that its operations are sufficiently similar to those of the newspaper employer in *Peerless* for the *Peerless* exception to apply to Respondent.

More to the point, the core purpose of Respondent is the education of students in the visual arts, as Respondent concedes in its brief (R. Br. 33). In that respect, its core purpose is no more tied to the duty of loyalty, conflicts of interest or other provisions in the Code than would the core purpose of any other employer, public or private. Indeed, the Code provisions are written with very little reference to the Respondent's educational objectives; rather they are addressed to financial dealings that would apply to any employer. This is confirmed by evidence showing that the NACUBO recommendations influenced Respondent in adopting the Code. Those recommendations limited application of any code of ethics or other provisions related to the Sarbanes-Oxley Act to auditors, senior management, executives and financial officers of member institutions. That is because the Sarbanes-Oxley Act applies to a broad spectrum of corporations, whose financial integrity was to be protected. But such general application of principles is not what the *Peerless* exception was meant to protect. As the Board stated in rejecting a similar argument in *American Electric Power, supra*, "integrity" is an "important *aspect* of any business;" but that is not enough to demonstrate that "integrity goes to the protection of the *core purposes*" of the enterprise. 302 NLRB at 1022. Accordingly, the Respondent has not established that the subject matter of the Code goes to the "protection of the core purposes of the enterprise," educating students in the visual arts.

In its reply brief (R. R. Br. 6), Respondent attempts to justify the Code by melding the core educational purposes of the College and the financial aspects of Sarbanes-Oxley. Both Vice-President Hill and President Fernandez suggested that the Code was somehow intended to attract and retain donors, including, apparently, parents and students who pay tuition (Tr. 128-131, 156). That effort cannot succeed. First of all, the core purposes exception in *Peerless* is an objective, not a subjective, standard. Thus, the motivation of the Respondent in adopting the Code is not relevant. Moreover, the concern about donors and tuition-payers expressed by Respondent's witnesses does not make the Code any more related to its core purposes than it would otherwise be. That concern is roughly comparable to a concern about investors, whose interests are the focus of the Sarbanes-Oxley legislation. But, as indicated above, that concern is the same concern that all employers have. Every corporate employer—indeed, every employer—has the same need to assure its own financial integrity. Moreover, the NACUBO Advisory Report, which was keyed to the needs of educational institutions and whose recommendations led to Respondent's adoption of the Code, limited its suggestion of a code of ethics to "senior financial officers." The Code is thus not only not uniquely directed to protecting Respondent's core purposes, but, in its application to faculty members, is far broader than necessary under the Sarbanes-Oxley Act and the NACUBO recommendations.

In any event, the Code is not "narrowly tailored, in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous." As indicated above, the Code is overly broad in its coverage because faculty members have little or no involvement in the financial matters that are the main focus of the Code. Moreover, some of the substantive provisions of the Code are themselves overly broad, vague and ambiguous. That is demonstrated not only by the testimony of Union President Sherman, but also by the fact that many of the highly educated and intelligent faculty members, who make up the bargaining unit in this case, signed the acknowledgement provision of the Code under protest because they could not understand the terms of the Code. A few examples suffice to confirm their concerns. The duty of loyalty provision of the Code (Section VIII) prohibits taking business opportunities that are within the scope of Respondent's "activities or planned activities." As indicated above, this puts into question the teaching of both full-time and adjunct faculty at other schools. But for an employee to devine Respondent's "planned activities" would require some kind of ESP that I am sure is not part of Respondent's course curriculum. Likewise ambiguous is the prohibition against using Respondent's "information" for "personal gain." Another prohibition is competing against Respondent, which includes "any . . .

situation where the faculty . . . is involved in an activity that takes away from [Respondent's] opportunities for sales or purchases of products, services or interests." The conflicts of interest policy (Section IX) provides further examples. It defines a prohibited conflict as a situation where the faculty members "are involved in activities for personal gain, whether measured in tangible or intangible benefits that might interfere or appear to interfere with the objective performance of their duties and responsibilities." According to the Code, "this includes any activities that have the potential to affect a [faculty member's] objectivity in the performance of his or her duties, as well as activities that could reflect negatively on the reputation of [Respondent]." Another specifically prohibited conflict of interest is "engaging in any other outside activity that influences or appears to influence the objective decisions required of faculty staff or officer in the performance of their duties." These are but a few of the prohibitions that are much too broad, vague and ambiguous to pass muster under the *Peerless* exception.[11]

One final note: This decision does not address whether the values embodied in the Code are worthwhile. It only determines that implementation of the Code involves mandatory subjects of bargaining. Accordingly, the issues presented by applying the Code to employees who have chosen to speak through a bargaining agent must be negotiated.

Conclusions of Law

1. By unilaterally implementing a Code of Ethics and Business Conduct and applying it to bargaining unit employees without bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

2. The above violation constitutes an unfair labor practice that affects commerce within the meaning of the Act.

Remedy

Having found that the Respondent violated the Act as described above, I shall recommend that it cease and desist from engaging in such violation, take affirmative action to remedy it, and post an appropriate notice. The Respondent will be ordered to rescind the Code insofar as it purports to apply to the bargaining unit members. See *Peerless Publications, supra,* 283 NLRB at 337.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended[12]

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[11] Contrary to the Respondent's contention in its reply brief (R. R. Br. 8) the Code's provision that an employee can seek an interpretation from a management official does not ameliorate the vagueness of the Code's substantive provisions. The fact remains that the employees do not know what conduct can cause their discharge. Any management interpretation would be unilateral and could not be cured, as indicated above, by a subsequent opportunity to grieve the matter.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Moore College of Art and Design, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, the Moore Federation of Teachers, AFT Local 2208, AFL-CIO, on request, about terms and conditions of employment embodied in the Respondent's Code of Ethics and Business Conduct, including its penalty provisions.

(b) Unilaterally promulgating, implementing or changing rules or codes of conduct, including any penalty provisions, which affect wages or terms and conditions of employment, or applying or enforcing such unilaterally promulgated rules or penalty provisions, without giving the Union notice and the opportunity to bargain.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, or interfering with the Union's efforts to bargain collectively with respect to the following appropriate unit:

> All persons employed by Respondent as professors, associate professors, assistant professors, instructors, department chairpersons and adjunct faculty, excluding all other employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind in writing the Code of Ethics and Business Conduct, including the penalty provisions, insofar as it applies to bargaining unit employees.

(b) On request, bargain with the Union concerning terms and conditions of employment to be contained in any revised Code of Ethics and Business Conduct that applies to bargaining unit employees, and, if an agreement is reached, embody it in a signed agreement.

(c) Within 14 days after service by the Region, post at its Philadelphia, Pennsylvania campus copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the campus involved in these proceedings, Respondent shall duplicate and main, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time after November 30, 2005.

[13] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official, on a form provided by the Region, attesting the steps that Respondent has taken to comply.

Dated, Washington, D.C., June 14, 2006.

Robert A. Giannasi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join and assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these activities.

WE WILL NOT refuse to bargain collectively with the Union, Moore Federation of Teachers, AFT Local 2208, AFL-CIO, on request, about terms and conditions of employment embodied in our Code of Ethics and Business Conduct, including its penalty provisions.

WE WILL NOT unilaterally promulgate, implement or change rules or codes of conduct, including any penalty provisions, which affect wages or terms and conditions of employment, or apply or enforce such unilaterally promulgated rules or penalty provisions, without giving the Moore Federation of Teachers notice and the opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act or interfere with the Union's efforts to bargain with respect to the following appropriate unit:

All persons employed by us as professors, associate professors, assistant Professors, instructors, department chairpersons and adjunct faculty, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL rescind, in writing, the Code of Ethics and Business Conduct, including the penalty provisions, insofar as it applies to bargaining unit employees.

JD-43-06
Philadelphia, PA

WE WILL, on request, bargain with the Union concerning terms and conditions of employment to be contained in any revised Code of Ethics and Business conduct that applies to bargaining unit employees, and, if an agreement is reached, embody it in a signed agreement.

MOORE COLLEGE OF ART AND DESIGN
(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street—7th Floor, Philadelphia, Pennsylvania 19106-4404, Telephone 215-597-7601.